

In: KSC-BC-2020-07

The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: Pre-Trial Judge

Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hysni Gucati

Date: 26th May 2021

Language: English

Classification: Public

Submissions for the Fifth Status Conference

Specialist Prosecutor

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I. INTRODUCTION

1. On 20th May 2021, in the Order Setting the Date for the Fifth Status Conference¹ ('Fifth Status Conference Order'), the Pre-Trial Judge requested written submissions to be filed on the topics set forth in points (2) – (4) of paragraph 14 of the Fifth Status Conference Order and, in a confidential annex to the aforementioned filing, submissions on paragraphs 3-4 of the Annex to the Fifth Status Conference Order².
2. The defence on behalf of Mr Gucati makes the following submissions herein and in the confidential annex hereto.

II. SUBMISSIONS RE PARAGRAPHS (14)(2) – (4) OF THE FIFTH STATUS CONFERENCE ORDER

(2) Disclosure

3. A list of the evidentiary material, disclosed to date pursuant to Rule 102 of the Rules, to which objection to admissibility will be taken can be submitted by 14 June 2021, with detail as to the nature of the objection to follow thereafter. It is envisaged that the list will be extensive.
4. Extant disclosure issues remain. The Parties await a decision on filing KSC-BC-2020-07/F00190 and the replies thereto³. The Parties await a decision from the

¹ Order Setting the Date for the Fifth Status Conference, KSC-BC-2020-07/F00204

² Annex to Order Setting the Date for the Fifth Status Conference, KSC-BC-2020-07/F00204/A01

³ Prosecution requests and challenges pursuant to KSC-BC-2020-07/F00172, KSC-BC-2020-07/F00190; Response to Confidential Redacted Version of 'Prosecution requests and challenges pursuant to KSC-BC-2020-07/F00172', KSC-BC-2020-07/F00190 dated 26 April 2020, KSC-BC-2020-07/F00199; Defence Response to

Court of Appeals Panel in relation to the indictment⁴. The material disclosed to the defence on 28th April 2021 under Rule 102(3) amounted to 17 lever arch files (disclosed after defence submissions for the Fourth Status Conference had been filed⁵ and only one full working day before the Fourth Status Conference itself).

5. Since the Fourth Status Conference another 18,670 pages of material has been disclosed under Rule 102(1)(b), of which 18,549 pages were disclosed yesterday (Disclosure 30, 25th May 2021) only two full working days before the Fifth Status Conference. The cover email to Disclosure 30 states that the 'SPO envisages seeking an addition to its exhibit list once the remaining requested information has been received', indicating that further material (of undeclared volume) is to be disclosed under Rule 102(1)(b).
6. The above further disclosures have taken place without any forewarning by the SPO. On the contrary, the SPO in their submissions for the Fourth Status Conference told the court that it had completed disclosure of all material in its possession falling under Rule 102(1) and that, save for applying for leave to add the 14 April 2021 declaration of W04841, no additional evidence request was envisaged⁶. Sadly, the SPO has been less than candid with the parties and the court – a pattern which has become all too familiar.
7. Accordingly, the concerns expressed previously regarding continuing disclosure difficulties relating to the remainder of the disclosure exercise remain. The disclosure obligations in Articles 21(6) of the Law and Rules 102(3)

SPO Confidential Redacted Version of 'Prosecution requests and challenges pursuant to KSC-BC-2020-07/F00172' and F00190, KSC-BC-2020-07/F00200; Prosecution reply to Defence Responses to Filing F00190, KSC-BC-2020-07/F00201

⁴ Notice of Interlocutory Appeal with Leave from Decision KSC-BC-2020-07/F00147 pursuant to Article 45(1) and Rule 170(2), KSC-BC-2020-07/IA004/F00003

⁵ Submissions for the Fourth Status Conference, KSC-BC-2020-07/F00194

⁶ Prosecution Submissions for Fourth Status Conference, KSC-BC-2020-07/F00191 at paragraphs 3 and 4

and 103 of the Rules of Procedure and Evidence are, of course, obligations on the SPO which continue throughout proceedings.

(3) Agreement on points of law and fact

8. The defence have previously indicated that, save in relation to biographical details, the dates of televised press conferences and speakers therein, any further agreement on points of fact is unlikely.
9. No proposals to agree points of law have been received.
10. As the defence have previously indicated, it is envisaged that a defence Pre-Trial Brief will be filed. The parties will be in a better position thereafter to identify any agreement on points of fact/law and a list of issues subject to dispute/not subject to dispute.
11. Submissions are set out below as to the timetable.

(4) Defence submissions and investigations

12. The defence have already indicated to the SPO in writing that it does not intend to offer a defence of alibi⁷.
13. In accordance with Rule 95(5), the defence will set out in its Pre-Trial Brief (a) the general nature of the Accused's defence, (b) the charges and matters which the Accused disputes, by reference to particular paragraphs in the Specialist

⁷ Email to SPO dated 9th May 2021

Prosecutor's Pre-Trial Brief and the reasons why the Accused disputes them, and (c) a list of potential witnesses the Defence intends to call, without prejudice to any subsequent amendment or filing thereof, specifying in relation to each witness, the particular relevant issue to which the evidence relates (whether or not the defence can be characterised in whole or in part as 'any other grounds excluding criminal responsibility').

14. No request for unique investigative measures is envisaged.

15. In relation to the remaining deadline set out in the Consolidated Calendar, namely, the deadline to file the defence Pre-Trial Brief by 14th June 2021, the defence is now concerned of its ability to meet that deadline.

16. As set out above, the case remains in a state of flux.

17. The Parties await a decision on filing KSC-BC-2020-07/F00190 and the replies thereto⁸.

18. The Parties await a decision from the Court of Appeals Panel in relation to the indictment⁹.

19. The material disclosed to the defence on 28th April 2021 under Rule 102(3) amounted to 17 lever arch files.

⁸ *Prosecution requests and challenges pursuant to KSC-BC-2020-07/F00172, KSC-BC-2020-07/F00190; Response to Confidential Redacted Version of 'Prosecution requests and challenges pursuant to KSC-BC-2020-07/F00172', KSC-BC-2020-07/F00190 dated 26 April 2020, KSC-BC-2020-07/F00199; Defence Response to SPO Confidential Redacted Version of 'Prosecution requests and challenges pursuant to KSC-BC-2020-07/F00172' and F00190, KSC-BC-2020-07/F00200; Prosecution reply to Defence Responses to Filing F00190, KSC-BC-2020-07/F00201*

⁹ *Notice of Interlocutory Appeal with Leave from Decision KSC-BC-2020-07/F00147 pursuant to Article 45(1) and Rule 170(2), KSC-BC-2020-07/IA004/F00003*

20. Since the Fourth Status Conference another 18,670 pages of material has been disclosed under Rule 102(1)(b), of which 18,549 pages were disclosed yesterday (Disclosure 30, 25th May 2021) only two full working days before the Fifth Status Conference. The cover email to Disclosure 30 states that the 'SPO envisages seeking an addition to its exhibit list once the remaining requested information has been received', indicating that further material (of undeclared volume) is to be disclosed under Rule 102(1)(b).
21. Significant defence investigations have already been undertaken in Kosovo and a series of conferences both already held and further planned to be held ahead of 14 June 2021 with a view to meeting that deadline.
22. However, given that (i) there are significant issues outstanding in relation to both ongoing disclosure under Rule 102(3) (including the scope of the Rule 102(3) notice), and the scope of the indictment, and (ii) given that the defence are having to respond to ongoing disclosure of very significant amounts of both evidence intended to be adduced by the prosecution and evidence which is otherwise material to the preparation of the defence, those investigations and the process of obtaining of instructions - by necessity - are incomplete and are unlikely to be completed by 14th June 2021.
23. In relation to the amount and type of evidence that is envisaged, as stated in the defence submissions for the very First Status Conference¹⁰, the defence intends to call evidence from a number of other participants in the chronology. No requests for protective measures are envisaged.

(5) Detention facilities

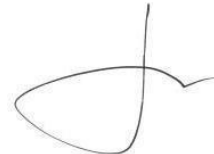
¹⁰ *Defence Submissions for the First Status Conference*, KSC-BC-2020-07/F00100

24. Despite an improving picture relating to the COVID pandemic, and the relaxation of restrictions outside the detention environment, no change to the regime of counsel/accused conference facilities has occurred. Counsel and accused remain separated in two different rooms, with communication occurring through a telephone line only.
25. Despite counsel yesterday being permitted to take a USB hard drive containing the 1TB of exhibits referred to in the List of Exhibits (not including the further 18,549 pages of Rule 102(1)(b) material disclosed yesterday) into the Detention Unit for the purpose of obtaining Mr Gucati's instructions on the Pre-Trial Brief, co-counsel was refused permission to bring the same USB hard drive into the Detention Unit to continue taking instructions. Although ultimately resolved in part (co-counsel was eventually permitted after discussing the matter with the Head of the Detention Unit to take in a USB hard drive, but not a USB stick) the matter took up precious time.
26. At the Fourth Status Conference on 28th April 2021, it was stated that a change in the policy to allow counsel to take USB devices into the Detention Unit would be actioned immediately¹¹. In the absence of wifi at the Detention Unit, counsel spent some days downloading the 1TB of exhibits relied upon by the SPO in this case (not including the further 18,549 pages of Rule 102(1)(b) material disclosed yesterday) in preparation for the conferences scheduled with the defendant for this week (counsel has previously complained about the separate difficulty involved in downloading material from the Legal Workflow system). The court, it is hoped, will understand that the ongoing practical

¹¹ Transcript page 252 line 10

difficulties in securing adequate facilities for preparation of the defence has been and is a source of significant frustration.

Word count: 1563 words



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